Supreme Court, U.S.
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No. 92-1367

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

NEW CASTLE COUNTY,
Petitioner,
v.
HARTFORD ACCIDENT AND INDEMNITY COMPANY,
a Connecticut Corporation, *et al.*,
Defendants,
and
CONTINENTAL CASUALTY COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In Respondent Continental Casualty Company's ("CNA's") March 19, 1993 Brief in Opposition ("CNA Opp."), CNA agrees that federal courts sitting in diversity jurisdiction, including the Third Circuit in this case, must follow the decisions of this Court in *West* and *Fidelity Union*. CNA Opp. at 8.[1] CNA nonetheless attempts to avoid this Court's scrutiny of the decision below by trying to twist the issue presented in New Castle County's ("the County's") petition for writ of *certiorari*

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[1] *West v. American Telephone & Telegraph Co.*, 311 U.S. 223 (1940) ("*West*"); *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940) ("*Fidelity Union*").

into one of state law, and by mischaracterizing the rulings in *West* and *Fidelity Union*.

The issue is not, as CNA contends, whether the Delaware state court decision in *Rhone-Poulenc* [2] is controlling in this case. CNA Opp. at 9-10. Rather, the issue which the County asks this Court to review is whether a federal court of appeals, sitting in diversity, is bound by *West* and *Fidelity Union* to consider an interlocutory decision of a lower state court, which cites with approval the decision under review, in the absence of any other indicia of the applicable state's law. CNA's assumption that only "controlling" decisions need be considered merely repeats the error committed by the Third Circuit. This Court should provide guidance on this issue because different circuits have treated interlocutory lower state court decisions in conflicting fashions. *See* discussion and cases cited at pp. 16-19 of the County's petition.

Furthermore, there is no basis for CNA's assertion that the Third Circuit implicitly considered *Rhone-Poulenc* in *New Castle VII* [3] and limited it to the particular facts and the issues resolved therein. CNA Opp. at 9. In fact, there is no evidence whatsoever that the Third Circuit did anything other than ignore *Rhone-Poulenc*.

Finally, even if the Third Circuit in *New Castle VII* explicitly had taken the position CNA now advocates, that position violates the holdings of *West* and *Fidelity Union*. The *Rhone-Poulenc* court's approval of *New Castle VI* [4] was the sole existing indicia of state law on point when the Third Circuit was deciding *New Castle*

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[2] *National Union Fire Ins. Co. v. Rhone-Poulenc Basic Chems. Co.*, No. 87C-SE-11 (Del. Super. Jan. 16, 1992) ("*Rhone-Poulenc*"), a copy of which is reprinted in the appendix to the County's petition for writ of *certiorari* ("the County's petition") at 46a-93a.

[3] *New Castle County v. Hartford Accident & Indem. Co.*, 970 F.2d 1267 (3d Cir. 1992) ("*New Castle VII*").

[4] *New Castle County v. Hartford Accident & Indem. Co.*, 778 F. Supp. 812 (D. Del. 1991) ("*New Castle VI*").

VII, and, in the absence of any indication that the Delaware Supreme Court would rule to the contrary, the Third Circuit was obligated to follow *Rhone-Poulenc*. *See West*, 311 U.S. at 237; *Fidelity Union*, 311 U.S. at 177-79.

Even assuming that CNA's argument that *Rhone-Poulenc* is not squarely controlling were correct, the Third Circuit still would have been obligated to consider the *Rhone-Poulenc* decision, and apply it by approving *New Castle VI*, in the absence of any contrary indicia of state law. CNA does not dispute the facts that *Rhone-Poulenc* involved the same landfill, the same standard-form insurance contract language, and the same underlying actions at issue in this case. *See Rhone-Poulenc*, reprinted in the appendix to the County's petition, at 75a n.26.[5] Rather, CNA incorrectly asserts that the Third Circuit was not obligated to consider *Rhone-Poulenc* because that case did not address the "precise issue" involved in this case. CNA Opp. at 10.

The Third Circuit already has recognized that it must not, as CNA suggests, apply "the state decisional law to the case at hand in a narrow and mechanical fashion." *Medvecz v. Choi*, 569 F.2d 1221, 1226 n.14 (3d Cir. 1977). Rather, the Third Circuit was obligated to "scrutinize the relevant state precedents with an eye toward the broad policies and principles that underlie and are given concrete embodiment in the cases." *Id.* (citations omitted).

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[5] Indeed, because both cases involve similar and sometimes identical issues of insurance contract interpretation, the Delaware Superior Court in *Rhone-Poulenc* repeatedly cited to many of the prior decisions in this case, including *New Castle VI*, as support for its decision. *See Rhone-Poulenc*, reprinted in the appendix to the County's petition, at 58a; 63a; 65a at n.16; 72a at n.22; 75a; 75a at nn.26, 27; 76a at n.28; 78a; 78a at n.32; 79a; 84a; 84a at n.39; 85a at n.40; 86a; 86a at n.41; 88a; 89a; 90a at n.46; 92a; 93a. Further, in the nearly two dozen times the Delaware Superior Court cited to prior decisions in this case on numerous issues, the *Rhone-Poulenc* court never once disagreed with the rulings in this case (*New Castle VII* not having yet been decided).

Contrary to CNA's assertion, federal courts sitting in diversity must "look to relevant, *i.e.*, *analogous*, state court decisions" when predicting how a state's highest court would rule, not just decisions which address the "precise issue" before the federal court. *Plummer v. Abbott Laboratories*, 568 F. Supp. 920, 922 (D.R.I. 1983) (citing 19 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 4507, at 91 (1982)) (emphasis added).[6] Indeed, even *dicta* of lower state courts is evidence of state law to be considered by federal courts sitting in diversity. *See, e.g., Florom v. Elliott Mfg.*, 867 F.2d 570, 578-80 (10th Cir. 1989), *reh'g denied*, 879 F.2d 801 (10th Cir. 1989) (federal court of appeals prefers *dicta* of state intermediate appellate court to a later district court decision in determining state law).

Therefore, for the reasons stated in the County's petition and here, this Court should issue a writ of *certiorari* to review the judgment of the Third Circuit in *New Castle VII*.

Respectfully submitted,

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[6] *See also Sorensen v. Tenneco Oil Co.*, 609 F. Supp. 838, 839 (D.N.D. 1985) (state supreme court decisions not "exactly on point" provided sufficient precedent to allow the federal court to resolve case without certification).